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SPEECHES

JUDICIAL SKEPTICISM AND THE THREAT OF TERRORISM

THE HONORABLE ROBERT D. SACK*

Chief Judge Jacobs; Second Circuit colleagues; judges; members of the Council, its Board and staff; law clerks past and present; other family, friends, and guests. I am overwhelmed by this award bearing the name of Learned Hand. If there were no such word as "vertiginous," I would have to invent it now.

I would like to spend a few minutes talking with you about the role of judges. What better place to begin than with our real honoree tonight, Judge Hand. Hand counseled individual modesty. He quoted, although perhaps a bit out of context, Oliver Cromwell's plea: "'I beseech ye in the bowels of Christ, think that ye may be mistaken.'"[1] And more famously, while World War II continued to rage and to devastate, while Western Europe was still in the grip of the Nazis, he invoked the spirit of liberty; "the spirit," he said, "which is not too sure that it is right; . . . the spirit which seeks to understand the minds of other men and women."[2]

Hand also spoke of the limited nature of the judicial role. In an opinion, he put it this simply: "[O]urs is only to apply the law as

* United States Circuit Judge for the Second Circuit Court of Appeals. These are Judge Sack's remarks upon receipt of the Learned Hand Award for Excellence in Federal Jurisprudence, which was awarded to him by the Federal Bar Council in 2008.

1. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 229 (Irving Dilliard ed., 2d ed. 1953) [hereinafter THE SPIRIT OF LIBERTY].

2. Learned Hand, The Spirit of Liberty (May 21, 1944), *in* THE SPIRIT OF LIBERTY, *supra* note 1, at 190.

we find it."[3] About opinions, he said: "[A]fter all, we are not speaking to eternity, but deciding disputes."[4] Just so. The judge's role is limited and passive: deciding disputes, and, in doing so, finding what the law is and applying it.

Not to say that what judges do is unimportant. For without a system of judging that works, the unmediated friction among the opposing forces of everyday life would likely reduce us to a society of warlords, chaos, or both.

The Framers were well aware of the confined nature of the job they gave us to do—even the Supreme Court may do no more than decide "cases and controversies."[5] They nonetheless saw the need that a coequal branch of government be written into the Constitution to perform that function.

The Second Circuit sits in the shadow of the ghost of the World Trade Center. My chambers are within the outer security perimeter of New York Police Headquarters and its counter-terrorism force. We are keenly aware that not a day goes by when members of the third branch do not address issues arising from or associated in one way or another with the horrors of September 11, 2001. It is not always easy. It requires us, for example, to indulge in occasional special measures of secrecy and security. As stewards of open public courts we are, as we should be, uncomfortable with those measures. But it is our job and we do it. Some of our colleagues on the district court do it with what seems to me to be conspicuous bravery.

This is an age of anxiety, then, but it is not the first time in living memory that we have had reason to be fearful. In the late 1940s, as a schoolchild, I participated in mandatory shelter-area drills. It is still not clear to me how ducking beneath our pine desks would have protected us from the blast and fallout of a Soviet atomic bomb. But we did what we were told to do.

In the midst of this post-war Soviet menace, Judge Hand wrote the opinion for the Second Circuit in *United States v. Dennis*.[6] The defendants had been convicted for willfully and knowingly conspir-

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3. United States v. Dennis, 183 F.2d 201, 234 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

4. Letter from Learned Hand to Robert G. Simmons, Chief Justice, Nebraska Supreme Court (May 25, 1940), *in* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 528 (1994).

5. *See* U.S. CONST. art. III, § 2.

6. *Dennis*, 183 F.2d 201.

ing to organize the Communist Party of the United States.[7] According to the indictment, in violation of the Smith Act, they taught and advocated the overthrow of the government by force.[8] The Second Circuit affirmed the convictions.[9]

Judge Hand analyzed the application of the clear and present danger test for the Court.[10] He famously concluded that "'clear and present danger' depends upon whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability."[11] Not uncontroversial to this day.

The point for tonight, though, lies elsewhere in that decision. Hand recounted in some detail the dangers that international communism then posed. "By far the most powerful of all the European nations," he wrote, "ha[s] been a convert to Communism for over thirty years; its leaders [are] the most devoted and potent proponents of the faith."[12] He went on,

> Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade . . . might prove a spark in the tinder-box, and lead to war. We do not understand, how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.[13]

But that raised the question: who would decide "whether the mischief of the repression [of the defendants' speech was indeed] greater than the gravity of [its] evil, discounted by its improbability"?[14] The courts, he said, even at that time of national peril. "In application of such a standard courts may strike a wrong balance," he wrote.[15] But, "[a]bdication is as much a failure of duty, as indifference is a failure to protect primal rights."[16]

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The 1960s and early 70s were no less apocalyptic. In 1962, there were Soviet missiles in Cuba capable of carrying nuclear warheads to much of the American mainland. It was also the time of the mistreatment and murder of civil rights workers, the assassina-

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7. *Id.* at 205.
8. *Id.*
9. *Id.* at 234.
10. *Id.* at 209.
11. *Id.* at 215.
12. *Id.* at 213.
13. *Id.*
14. *Id.* at 215.
15. *Id.* at 212.
16. *Id.*

tions of President John F. Kennedy and Martin Luther King, Jr., the immolation of American inner cities, the war in Vietnam, and the resulting bitter divisions at home. To borrow Judge Gurfein's understated phrase from his *Pentagon Papers* decision, "troubled times."[17]

In many ways, that era ended with the 1974 resignation of President Richard Nixon. His successor, Gerald Ford, referred to the events that led to the resignation as "our long national nightmare."[18] It was the culmination of a historic confrontation between Congress and the executive branch. But central to those events was the Supreme Court's decision in *United States v. Nixon*[19]—the tapes case. Special Prosecutor Leon Jaworski had subpoenaed tape recordings of White House conversations among the President and his aides.[20] He sought them as evidence against seven former presidential associates in Watergate-related prosecutions.[21] The district court ordered the President to turn over the tapes to it for review.[22] He resisted, asserting executive privilege.[23] The President's lawyers pointed out to the Supreme Court that this was an intra-branch dispute—federal prosecutor against United States President.[24] They urged that the judiciary had no role to play.[25]

Speaking for an undivided Supreme Court, Chief Justice Burger rejected the argument.[26] The evidence, he said,

> is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable."[27]

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17. United States v. New York Times Co. (*Pentagon Papers*), 328 F. Supp. 324, 331 (S.D.N.Y. 1971), *rev'd per curiam*, 403 U.S. 713 (1971).

18. Remarks on Taking the Oath of Office, 2 PUB. PAPERS 2 (Aug. 9, 1974).

19. United States v. Nixon, 418 U.S. 683 (1974).

20. *Id.* at 687-88.

21. *Id.* at 687.

22. *Id.* at 686.

23. *Id.*

24. *Id.* at 692.

25. *Id.* at 692-93.

26. *Id.* at 697.

27. *Id.* (quoting United States v. Interstate Commerce Comm'n, 337 U.S. 426, 430 (1949)).

The issues were therefore "controversies" for the courts, and only the courts, under Article III.[28]

The Court decided that the President had no blanket executive privilege under the circumstances.[29] He was required to turn the tapes over to the district court *in camera* for its determination as to their relevance.[30] And largely because of the so-called "smoking gun" tape then disclosed, within three weeks, the President left office.

In *Nixon*, the Court noted that national security was not at issue.[31] It is, therefore, unclear how it would have treated the claim of executive privilege had national security concerns been asserted. But the Court's approach seems to me entirely inconsistent with the notion that, had the President's lawyers only thought to say "national security," the Supreme Court would, for these purposes, have closed its doors.

To bring you to the present day, I would like to draw a parallel for you between *Dennis*, *Nixon*, and a recent case in our court.[32] To get there, though, I have to proffer a brief disclaimer. My colleague Judge Cabranes has referred to me—affectionately, I hope—as a "voluptuary of the First Amendment." Fair enough. I spent most of my time in practice as a so-called "media lawyer." That's an understatement. To say you were a media lawyer when you represented *The Wall Street Journal*, as I did, is a little like saying you just had a glass of merlot when in fact you were sipping Chateau Pétrus. But okay, I was a media lawyer.

Because of my background, I turn now to a press case by way of illustration with some trepidation. I am not talking tonight about the press particularly or perhaps at all. My subject is the courts.

In 1970, John Mitchell's Department of Justice ("DOJ" or "Department") promulgated departmental guidelines for its decisions as to when and under what circumstances it would subpoena members of the news media. The guidelines exist today substan-

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28. *Id.*; *see also* U.S. CONST. art. III, § 2.

29. *Nixon*, 418 U.S. at 713.

30. *Id.* at 714.

31. *Id.* at 706.

32. New York Times Co. v. Gonzalez, 459 F.3d 160 (2d Cir. 2006); *see also Nixon*, 418 U.S. 683; United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

tially in that form.[33] And in 2006, a panel of our court decided a case touching on them.[34]

The Department was seeking the source of "leaks" to *New York Times* reporters.[35] The sources had tipped off the *Times* about impending raids on organizations suspected of channeling financial support to terrorists.[36] The question was whether the government could subpoena the reporters' phone records from third-party telephone companies to identify the sources.[37] The prosecutors assured the district court that the Mitchell-era guidelines had been met.[38] They urged this as an end to the matter; Judge Sweet thought it was not. Citing to existing qualified legal protection for such sources, he concluded that the prosecution had not established that the qualifications had been met.[39]

A majority of a Second Circuit panel on which I sat disagreed.[40] It concluded that whatever legal protection there may be for such sources, it is conditional. The majority thought that whatever the conditions, they had indeed been satisfied. I, on the other hand, thought they had not been, and therefore voted, in dissent, to affirm the judgment of the district court.[41]

It seemed to me, though, as I wrote at the time, that "the question at the heart of th[e] appeal [was] not so much whether there [was] protection for the identity of reporters' sources, or even what that protection [was], but [rather] which branch of government decides whether, when, and how any such protection is overcome."[42] And as to that, I then said, I thought the panel unanimous in the view "that the executive branch of government [does not have] that sort of wholly unsupervised authority to police the limits of its own power under these circumstances."[43] I quoted a concurring opinion of Judge Tatel in a not dissimilar case in the D.C. Circuit.[44] "[T]he

33. *See* 28 C.F.R. § 50.10 (2008).

34. *See New York Times Co.*, 459 F.3d 160.

35. New York Times Co. v. Gonzalez, 382 F. Supp. 2d 457, 462 (S.D.N.Y. 2005), *vacated*, 459 F.3d 160 (2d Cir. 2006).

36. *Id.* at 466.

37. *Id.* at 464.

38. *Id.* at 480-81.

39. *Id.* at 484-513 (including protections under the First Amendment and federal common law).

40. *New York Times Co.*, 459 F.3d 160.

41. *Id.* at 174 (Sack, J., dissenting).

42. *Id.* at 175.

43. *Id.* at 177.

44. *In re* Grand Jury Subpoena Judith Miller, 438 F.3d 1141, 1175 (D.C. Cir. 2006).

executive branch," he said, "possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts."[45] Even, he might have added, in a nation under continuous threat of attack.

Tension between the government and the press about whether and how to enable journalists to continue effectively to assure source confidentiality continues. The Senate Judiciary Committee has been considering a statute not terribly unlike the DOJ guidelines.[46] Because it would be law, though, it would be enforceable in the courts.

Several months ago, I received from a fine editor, old friend, and former client an e-mail containing a statement by the Attorney General of the United States. On behalf of other intelligence and law enforcement agencies and the DOJ, the Attorney General had testified against the source protection bill.[47] Referring to the DOJ guidelines, the Attorney General said:

> Under the current system, [those] guidelines determine in any specific case whether it is appropriate to issue a subpoena to a reporter. These internal guidelines provide a series of standards and checklists, including my specific approval, before any reporter is subpoenaed. . . . [U]nder the Media Shield bill, even in an investigation of a past terrorist attack the bill would have a judge decide whether the Department's need for the information . . . outweighs the "public interest" in the free flow of information. No standard for decision is provided in the bill. But even if one views these factors as capable of being balanced, this is not a determination that can reasonably be asked of a judge, particularly in cases involving national security.[48]

Back in 1974, when I was literally half my age, I was a member of the House Judiciary Committee impeachment inquiry staff. In light of that experience and those memories, when I heard the Attorney General's 2008 reference to Executive Branch leaks, I thought of the Nixon White House and its Special Investigation

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45. *Id.* at 1175-76; *see also New York Times Co.*, 459 F.3d at 177.

46. *Oversight of the U.S. Department of Justice, Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 21-22 (2008) (statement of Michael B. Mukasey, Att'y Gen. of the United States), *available at* http://online.wsj.com/public/resources/documents/MukaseyStatement20080128.pdf.

47. *Id.*

48. *Id.* at 22.

Unit. They were called the "Plumbers," as you know, because their job was to plug leaks from the Executive Branch.[49] When I then saw, in the same paragraph of the Attorney General's testimony, the phrase "national security," I thought myself listening again to the March 21, 1973, Oval Office tape.[50] The discussion was about how, in light of the fallout from the break-in at The Watergate, the White House could explain one of the Plumbers' operations—the break-in at the office of Daniel Elsberg's former psychiatrist. I can still hear President Nixon saying: "No, seriously, National security. We had to get information for national security grounds."[51] The magic words: "National security."

I do not mean for a moment to suggest that 2008 is 1973 again. These times are not those times; these people are not those people. I have vast regard for the Attorney General, another old friend and a former partner. I told the Judiciary Committee vetting my nomination in 1998 that he was the active judge whom I most admired—significantly because of his handling of national security cases.

As I understand him, though, he is saying that the Department of Justice has long appreciated that there is a conflict here between critical interests of law enforcement and the press. But to protect the nation against terrorism, not only should Congress not make a law on the subject, but judges have no role to play. The DOJ will pass the law protecting sources and decide cases and controversies under it by itself, thank you all the same.

If that is so—if such disputes must be decided not by judges but by the prosecutors themselves according to their own rules—then I think the Attorney General is telling us that here, our system does not work. He may be right! But I think that the presumption is otherwise—that judges decide such disputes. The nation's chief law enforcement officer must, I submit, make a substantial and persuasive showing to overcome that presumption.

The judicial role is largely passive, as I've said. It's modest. But when that modest and passive role seems to be impinged upon, we have James Madison to contend with. "[T]he great security against a gradual concentration of the several powers in the same department," he said, "consists in giving to those who administer

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49. JIM HOUGAN, SECRET AGENDA 36 (1984).

50. TRANSCRIPT OF A RECORDING OF A MEETING AMONG THE PRESIDENT, JOHN DEAN, AND H.R. HALDEMAN IN THE OVAL OFFICE, ON MARCH 21, 1973, FROM 10:12 TO 11:55 AM, at 73, *available at* http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/trial/exhibit_12.pdf (last visited Mar. 15, 2009).

51. *Id.*

each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."[52]

As I've noted, we judges do little more than resolve disputes "of a type which are traditionally justiciable," and in doing so, we interpret and apply the law. But, paradoxically, Madison expected us to insist, as Judge Hand and Justice Burger did, that it is we and not a co-equal branch that will, with carefully considered exceptions, make those decisions in light of the law as we understand it to be. One of the lessons is Hand's, perhaps echoing Madison: "[I]f we are to be saved it must be through skepticism."[53] "Skepticism." Perhaps Hand's favorite theme.

In the Nixon tapes case, Chief Justice Burger said for the Supreme Court,

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.[54]

I think, then, that if another branch says that it is not for us to decide a traditionally justiciable dispute, that branch must explain very clearly and very persuasively why not. We must be skeptical of any such claim. I have done my own electronic search of the *Federalist Papers* and can find nowhere in them the phrase, "Trust me."

I am reminded finally of something that predated Hand and Burger by some two thousand years. My father frequently quoted Rabbi Hillel's familiar exhortation. In my father's translation it is: *If I am not for myself, who will be for me? If I am only for myself, what am I? If not now, when?*[55] If we judges do not use our skepticism in protecting our role under the Constitution, who will defend it? As Hillel said, "[W]ho will be for [us]?"[56] If we do so reflex-

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52. THE FEDERALIST NO. 51 (James Madison).

53. THE SPIRIT OF LIBERTY, *supra* note 1, at xxv.

54. United States v. Nixon, 418 U.S. 683 (1974).

55. *See* Jewish Virtual Library, Hillel and Shammai, http://www.jewishvirtual library.org/jsource/biography/hillel.html (last visited Mar. 15, 2009).

56. *Id.*

ively, single-mindedly, *ambitiously*, if we act as no more than one side in a controversy, we are not acting as judges. We fail ourselves and our mission. Like Hillel, we must ask, what are we?

Most important, perhaps, insofar as the manifold challenges we now face call for a firm and effective response by the national government, it is the national government that must respond; not one of its branches. The need for a vigorous judiciary to address the mostly difficult, sometimes divisive cases and controversies that arise is, at this trying time, undiminished. Rabbi Hillel said, "[I]f not now, when?"[57] In this context, perhaps, *now more than ever*.

I thank you all.

57. *Id.*